No. 34630-3-II

DIVISION II, COURT OF APPEALS
OF THE STATE OF WASHINGTON

JESSE MAGANA,

Plaintiff/Respondent

v.

HYUNDAI MOTOR AMERICA;
HYUNDAI MOTOR COMPANY,

Defendants/Appellants

and

RICKY and ANGELA SMITH,
husband and wife, et al.,

Defendants/Respondents

ON APPEAL FROM CLARK COUNTY SUPERIOR COURT
(Hon. Barbara D. Johnson)

APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES AND COURT RULES

MISCELLANEOUS

I.

SUMMARY INTRODUCTION

This Court remanded for a trial. The trial court instead defaulted Hyundai, as a sanction for purported discovery violations.

The record does not support the findings required for such a default:

- Willfulness. The trial court's willfulness findings are fatally tainted, substantively and procedurally. The court's refusal to find the parties entered into a discovery agreement, taking seat back OSI's off the table, defies the evidence. And while indicting Hyundai's handling of seat back "claims," the court denied Hyundai a fair opportunity to be heard on the central issue of what a "claim" is.

- Prejudice. Magana failed to prove prejudice because he failed to prove substantial similarity of the supposed other similar incidents. He asserted that "staleness" caused by a wrongful delay in production prevented him from showing substantial similarity, but refused to conduct the kind of investigation required to prove staleness. The trial court's finding of prejudice, in the face of those failures, constitutes a manifest abuse of discretion under any conceivable standard of review.

The Texas Supreme Court recently warned:

> . . . product defects must be proved; they cannot simply be inferred from a large number of complaints. If the rule were otherwise, product claims would become a self-fulfilling prophecy -- the more that are made, the more likely all must be true.

Nissan Motor Co. v. Armstrong, 145 S.W.3d 131, 142, 47 Tex. Sup. Ct. J. 955 (2004) (reversing and remanding for a new trial). Magana repeatedly

asserts a litany of supposed other similar incidents, as if their ultimate admissibility and relevance were a given. But that is not the law. "OSI's" must be carefully scrutinized to assure they are truly similar incidents, the admission of which will aid -- not impair -- the search for truth.

Magana failed to prove either that he had been deprived of the ability to offer into evidence truly similar incidents, or that any deprivation could only be cured by the ultimate sanction of default. Due process, and preserving the right to jury trial inviolate, both require establishing that a discovery violation has deprived the complaining party of the chance for a fair trial on the merits, before a default may issue. Because Magana failed to prove any discovery violation by Hyundai deprived him of such a chance, this Court should reverse the trial court's default judgment, and remand for further proceedings.

II.

ARGUMENT ON REPLY

A. Hyundai Has Fully Complied With All Requirements for Challenging Findings of Fact.

Magana claims Hyundai has failed to "argue" several of the trial court's findings, rendering them verities. Magana does not dispute that Hyundai properly assigned error, as required by RAP 10.3(g). Magana suggests that, because Hyundai does not refer specifically to certain findings by number in the argument section of its Brief, those findings have become verities because Hyundai has failed to "argue" them.

Magana accurately cites City of Burien v. Cent. Puget Sound Growth Mgmt. Hearings Bd., 113 Wn. App. 375, 383, 53 P.3d 1028

(Div. II 2002), for the general proposition that unargued findings are verities. See Magana's Brief at 6 n.4. But nothing in City of Burien even hints that an appellant must reference by number every finding to which error has already been assigned, to satisfy the argument requirement pertaining to challenged findings. Magana offers no reason why a challenge to a finding, fully supported by reasoning and the requisite legal authority, nonetheless fails if the appellant omits a "signpost" cross-reference to the finding by number. This Court should decline to endorse such a requirement.[1]

B. Magana Wrongly Claims the Benefit of a Liability Finding That Has Yet to Be Made by a Jury Trial Untainted by Prejudicial Error.

Magana claims to have been confined to a wheelchair "because Hyundai negligently manufactured a dangerously defective car." Magana's Brief at 1. No one disputes the extent of Magana's injuries, or that they were caused by his ejection out the back window of the 1996 Hyundai Accent in which he was a passenger, when Ricky Smith lost control of that vehicle and a calamitous accident ensued. But the seriousness of his injuries does not entitle Magana to claim the benefit of a finding of liability that has not yet been made.

The one jury trial held to resolve the truth of Magana's design defect claim was tainted by prejudicial error induced by actions of Magana's counsel. After this Court reversed and remanded for retrial on

[1]Hyundai has prepared a chart, attached as the sole Appendix to this Brief, identifying which findings Magana claims are verities under his "cross-reference" test for argument.

liability, the same judge who presided over the first trial instead struck Hyundai's answer and ordered entry of a default judgment. A default judgment can no more be a valid determination of Hyundai's actual, factual responsibility for Magana's injuries than a jury verdict tainted by prejudicial error.

In the American court system, it is by trial (and, most particularly, jury trial) that truth is determined, and allocation of responsibility for injuries is decided. There has yet to be a trial, untainted by prejudicial error, to resolve the truth of Magana's contention that he is confined to a wheelchair because Hyundai manufactured a dangerously defective car. And there never will be such a trial, and such a truth finding, if this Court affirms the present default.

C. Magana Wrongly Attempts to Challenge This Court's Prior Decision in This Case, by Launching a Baseless Attack on the Conduct of Hyundai's Counsel at the First Trial. This Court Correctly Recognized That Clear Error Induced by Magana's Counsel Had Deprived Hyundai of a Fair Trial, and Compelled Remand for Another Trial.

This Court, after a "comprehensive examination of the record," found that:

> . . . considering the significant evidence rebutting Magana's defective seat back theory, there is a reasonable probability that the seat back evidence was unpersuasive to at least one of the ten jurors voting for liability, and that such juror relied instead on Burton's stricken evidence about the seat belt system. Because one vote would have changed the outcome, the error in failing to advise the jury that the court had stricken Burton's seat belt evidence was neither trivial, formal, nor academic. Rather, there is at least a substantial possibility that the error affected the verdict.

Magana v. Hyundai Motor America, 123 Wn. App. 306, 319, 94 P.3d 987 (2004) (internal quotations omitted). Magana now asserts this error was

"at least partially caused by Hyundai's own false statement to the trial court[.]" See Magana's Brief at 1. And Magana further asserts that (supposed) false statement "at least partially misled this Court to reverse the first verdict." See id. at 59 (Argument, Section E, heading) (emphasis added); see also id. at 60-61 (Hyundai "lied to the trial court and to this Court" and "[u]nfortunately, Judge Johnson and this Court were misled").

The charge of a falsehood is itself false. Magana claims his counsel tried to "correct Hyundai's misrepresentation at trial[,]" citing Clerk's Papers page 1981. See Magana's Brief at 62. CP 1981 turns out to be the same page of the first trial record as appears at CP 3441. As Hyundai pointed out in its Opening Brief, that page shows Magana's trial counsel failed to disclose to the trial court that (as Hyundai's counsel promptly did in rebuttal) Dr. Burton had expressly abjured early on in his deposition any intention to offer opinions about design. See Hyundai's Opening Brief at 23-24, citing and quoting CP 3441-42 (June 10, 2002 trial VRP [VII-B] 993:16-994:1).

Magana's counsel introduced design testimony in violation of discovery disclosures, and then (after the trial court struck the evidence) induced the trial court to commit clear error, by persuading the court not to tell the jury the evidence had been stricken. Those actions fatally tainted the first jury's verdict, and were the only reason this case had to be sent back for retrial.

D. Closer Scrutiny of a Trial Court's Determinations Made in Support of a Default Judgment, Particularly One That Deprives a Party of a Jury Trial, Is Consistent With Washington Precedents and Required by the Mandates of Due Process.

As our Supreme Court underscored just last year, imposition of the sanction of a default judgment requires more than imposition of monetary sanctions. See Mayer v. Sto Indus., Inc., 156 Wn.2d 677, 689-90, 132 P.3d 115 (2006) (holding that "on the record" consideration of the three part test of Burnet v. Spokane Ambulance, 131 Wn.2d 484, 933 P.2d 1036 (1997), is required to impose "sanctions that affect a party's ability to present its case" but not to impose monetary sanctions). The imposition of monetary sanctions does not require a finding of willfulness or substantial prejudice, Mayer, 156 Wn.2d at 690; due process requires that a finding of willfulness and substantial prejudice precede a default. See, e.g., Smith v. Behr Process Corp., 113 Wn. App. 306, 325, 54 P.3d 655 (Div. II. 2002) (citations omitted).

Those distinctions are consistent with the significant protections provided in Washington law against default judgments generally. Defaults are disfavored because they deprive the parties and the judicial system of a determination of a case on its substantive merits. Showalter v. Wild Oats, 124 Wn. App. 506, 510, 101 P.2d 867 (Div. II 2004) (citations omitted). And because the right to jury trial must be "protected from all assaults to its essential guarantees," Sofie v. Fibreboard Corp., 112 Wn.2d 636, 656, 771 P.2d 711, amended, 780 P.2d 260 (1989), defaults that deprive a party of a jury trial should be especially suspect.

Magana recites generalities about abuse of discretion -- that appellate courts grant "broad discretion" because trial courts are "better positioned" and must have "wide latitude in determining appropriate sanctions." See Magana's Brief at 23-27. But here, numerous facts confound the usual reasons for deferring so generously to a trial court's exercise of discretion: (1) the grant of a default judgment that also deprived the sanctioned parties of their constitutionally protected jury trial; (2) a decision to default based overwhelmingly on a written record; (3) the trial court's express refusal to make a credibility finding in favor of a key Magana witness who testified solely via declaration; and (4) the trial judge's failure to "taste the flavor" of the pertinent portion of the trial court proceedings. None of the holdings of any of Magana's case authorities support Magana's preference for extending minimum scrutiny and maximum deference to a case involving these circumstances.

Magana dismisses as merely "federal" the words of the eminent jurist Henry Friendly, cited and quoted with approval in the Ninth Circuit's decision in Toussaint v. McCarthy, 801 F.2d 1080 (9th Cir. 1986), stating that the term "abuse of discretion" actually has "half a dozen definitions," all of which are based on particular circumstances. See Toussaint v. McCarthy, 801 F.2d at 1088 (citing Henry Friendly, Indiscretion About Discretion, 31 Emory L.J. 747, 762-63 (1982)). Yet Washington courts regularly look to federal law for guidance. See, e.g., Beal v. City of Seattle, 134 Wn.2d 769, 777, 954 P.2d 237 (1998) (court rules) ("persuasive" federal reasoning will be followed); American Mobile

Homes of Wash., Inc. v. Seattle-First Nat'l Bank, 115 Wn.2d 307, 317, 796 P.2d 1276 (1990) (federal jurisprudence on "priority of action" rule provides "useful guidance"). And federal courts recognize that, for discretionary determinations, the scope of review "will be directly related to the reason why that category or type of decision is committed to the trial court's discretion in the first instance." Toussaint, 801 F.2d at 1088 (citing United States v. Criden, 648 F.2d 814, 817 (3d Cir. 1981)).

If an abuse of discretion standard is used because one judicial actor is presumptively "better positioned" than another, see Washington State Physicians Insurance Exchange v. Fisons Corp., 122 Wn.2d 299, 339, 858 P.2d 1054 (1993) (citing federal cases), the degree of deference logically should be less when the record establishes the trial court actually was not better positioned (e.g., because the trial judge did not "taste the flavor" of relevant events and proceedings). Washington appellate courts, moreover, closely scrutinize a trial court's nominally discretionary determinations when they are based solely on documentary evidence, and credibility is not an issue. E.g., In re Marriage of Langham & Kolde, 153 Wn.2d 553, 559, n.4, 106 P.3d 212 (2005) (using a de novo standard of review; expressly approving Division III's decision in In re Parentage of Hilborn, 114 Wn. App. 275, 278, 58 P.3d 905 (2002), which reviewed a trial court commissioner's decision de novo when based solely on documentary evidence).

Hyundai is not -- as Magana asserts -- asking for de novo review of the trial court's default judgment (although elements of the determinations underlying that judgment are subject to de novo review, as this Brief will

demonstrate).[2] But Hyundai does urge this Court to make clear that default judgment sanctions will not be insulated from the searching scrutiny to which default judgments normally are subject, just because the default is labeled a "sanction" for "discovery abuse." As our Supreme Court warned in Fisons, "requests for sanctions should not turn into satellite litigation or become a 'cottage industry' for lawyers." See 122 Wn.2d at 356. Mechanical recitations of deferential phrases, as Magana suggests this Court employ, can only encourage parties in Magana's position to choose the aggressive pursuit of sanctions, not merely to penalize discovery violations, but also to avoid a trial on the merits that they might well lose. Washington courts should seek to nip such a development in the bud, before it frustrates the search for truth -- and justice based on the resolution of that search -- which is the cornerstone of our civil justice system.

E. The Trial Court's "No Agreement" Finding Rests on a Single Witness's Summary Written Denial That the Parties Agreed to Take OSI Seat Back Discovery off the Table. That Denial Is an Untenable Basis for Sustaining the Court's Finding, in the Face of an Overwhelming Body of Uncontroverted Facts Establishing Such an Agreement Was Made.

Magana's initial theory of a willful discovery violation centered on the assertion that Hyundai did not answer when Magana, in April of 2001,

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[2]The Washington Supreme Court has never actually held that a default judgment sanction can be reviewed solely for abuse of discretion, and this Court therefore should be free to employ a de novo standard of review in this case, if such review is otherwise called for. However, Hyundai does not believe either that a de novo standard of review, or a departure from established principles of Washington abuse of discretion review, should be necessary to support a reversal of the trial court's default judgment.

objected to the scope of Hyundai's discovery responses to the OSI Requests for Production -- RFP No. 20 (relating to seat backs) and RFP No. 21 (added in the Fall of 2000, and relating to air bags). That assertion was false. Ultimately, Magana did not dispute either that Hyundai's counsel did respond, or that the ensuing CR 26 exchange was followed by a letter from Hyundai's counsel in July of 2001 itemizing discovery Hyundai would provide. But Magana did assert -- and the trial court found -- that the outcome of the O'Neil-Austin CR 26 exchange did not include an agreement that Hyundai need produce only air bag OSI's and not seat back OSI's.

Magana's defense of the trial court's finding rests on three assertions:

First, Magana states Hyundai did not raise the existence of the agreement until four and one-half years later, after the parties' OSI production dispute in the Fall of 2005 (resolved by the trial court's production order of November 2005). See Magana's Brief at 17-18. That point is factually correct, but legally irrelevant. The agreement was entered into before the first trial, and the fact Magana decided not to pursue OSI seat back discovery then could have no bearing on whether Magana was now entitled, years later, to reopen the issue in preparing for retrial.

Second, Magana claims Austin and O'Neil "exchanged a series of letters and phone calls concerning air bags and crash tests, not RFP 20 and seat back failures[,]" citing (in order) Clerk's Papers pages 4791, 2532

through 2541 and 3707-08. See Magana's Brief at 18. In fact, O'Neil's April 26, 2001 letter did expressly reference RFP No. 20 (seat back OSI's) as well as RFP No. 21 (air bag OSI's), see (CP 3928) (letter at 2), while O'Neil's declaration testimony (CP 4791, cited by Magana) refers to many letters but says nothing about the content of his CR 26 telephone conversations with Austin. See (CP 4791) (O'Neil's Decl. at 2, ¶ 5).

Third, Magana claims Austin's letter of July 11, 2001 "says nothing about an agreement." See Magana's Brief at 18. That apparent echo of the trial court's finding to the same effect (FOF No. 34, CP 5322) ignores, as did the trial court, the plain language of Austin's letter, which expressly refers to "our agreement" to produce "four areas" of documents the letter lists. (CP 3939-40) (Austin's letter at 1-2) (emphasis added).

Magana's defense fails to come to grips with the following facts:

- Magana's design defect theory had shifted from a focus on seat backs to a focus on air bags, by the Spring of 2001. In June 2000, Hyundai requested clarification of Magana's defect theory. See (CP 3811-15) (copy of letter dated June 29, 2000 at 2). In response, Magana asserted for the first time that an overly aggressive air bag caused Magana's injuries. (CP 3833) (Magana's supplemental responses at 4). On April 26, 2001, Magana's counsel stated in a letter to Hyundai's counsel, that "it was the passenger air bag that was responsible for Jesse Magana's injuries." (CP 3927) (O'Neil Letter at 1) (emphasis added).[3]

[3]Magana claims he "consistently maintained that the Accent's entire restraint system -- seatback, airbag, and seatbelt -- was defective." See Magana's Brief at 19 (chart). But the relevant point is which portion of the system Magana considered the primary cause of his injuries, and therefore chose as the focus of his discovery. Magana's chart of the record omits the critical period of Summer 2000-Summer 2001, when Magana's counsel considered an overpowered air bag to be the primary cause of Magana's injuries.

- After O'Neil's April 2001 letter and the ensuing CR 26 conferences, Hyundai only promised to produce only air bag OSI's. O'Neil's April 26, 2001 letter demanded that RFP No. 20 (seat back OSI's) and RFP No. 21 (air bag OSI's) "should be answered as written." (CP 3928). Austin initiated a series of telephone conversations, attempting to determine what Magana "was really seeking by way of discovery." (CP 3707) (Austin Decl. at 5, ¶ 20). O'Neil does not deny the fact or content of those discussions, except to deny making any agreement to take seat back OSI's off the table. See (CP 4791) (O'Neil Decl. at 2, ¶¶ 3-5). Austin's July 11, 2001 letter to O'Neil states: "You [Magana's counsel] have identified four areas that you requested we respond to." (CP 3939) (Austin Letter at 1). The letter promised a production of air bag OSI's, and said nothing about seat back OSI's. (CP 3939) (Austin Letter at 1).

- Hyundai's ensuing production included only air bag OSI's, and only lawsuits and attorney demand letters. In August 2001, Hyundai produced documents relating to 19 lawsuits and two demand letters. See (CP 3708) (Austin Decl. at 6, ¶ 21); (CP 3942-44) (chart itemizing the items produced, copy attached as Ex. X to Austin Decl.). Hyundai produced neither seat back OSI's nor any consumer hotline records.

- Magana never objected to the scope of Hyundai's production. Magana never objected to Hyundai's August 2001 production as lacking either seat back OSI's or consumer hotline information.

The trial court gave two reasons for finding there was no agreement to take seat back OSI's off the table. The trial court gave the "false premises created by defendants' initial discovery responses" as a reason to credit O'Neil's denial of an agreement. See (CP 5322-23) (FOF No. 35). But whether O'Neil was misled sheds no light on whether he still made the agreement. The trial court also found it would be unreasonable to conclude that Magana abandoned the "issue of seat back failure." (CP 5323) (FOF 35). But Hyundai never claimed Magana agreed to abandon the issue of seat back failure itself, only the pursuit of seat back OSI's.

The trial court did not understand the sequence of events leading up to the 2001 agreement, because the court had no contemporaneous exposure to the discovery process underlying that agreement. The court's first exposure to those matters came in December 2005, with the filing of Magana's motion for default. Judge Johnson did not -- as she claimed in her findings -- "taste the flavor" of the case at the critical juncture. She was told by Magana how the case supposedly tasted, and accepted that after-the-fact representation.[4]

Moreover, the only evidence that supports a "no agreement" finding is the written summary denial set forth in Peter O'Neil's declaration. O'Neil was not called to testify at the evidentiary hearing. On the agreement issue, Magana chose to rest entirely on the written record. And when Magana tried to shoehorn into the findings an endorsement of O'Neil's credibility, Judge Johnson declined to include such a finding. Compare (CP 5056) (Magana's Proposed Findings of Fact and Conclusions of Law Re: Default Judgment at 9, FOF No. 23) with (CP 5322-23) (Findings of Fact and Conclusions of Law at 12-13, FOF Nos. 34-35). This Court therefore is free -- even without considering the default context at issue -- to make an

[4]Magana ridicules the "taste the flavor" metaphor ("A trial court is not a ruminant"), even though the image, first employed by the federal courts, has been embraced by Washington courts (including Judge Johnson in this case). The metaphor is not intended to insult trial courts, but to capture the important point that trial courts deserve a degree of deference when their sanction decisions arise out of a flow of events only the trial court has experienced, and which the appellate court cannot hope to recapture from a cold record. And that is the problem for Magana here: Judge Johnson was not involved in the flow of events at issue, and therefore has no claim to deference on that basis.

independent determination of whether the parties took seat back OSI's "off the discovery table" in the Summer of 2001. This Court should reject the trial court's "no agreement" finding, because the evidence before the trial court compels the opposite determination.

Nor is this mere error "hanging in the air." Hyundai objected from the outset to producing seat back OSI's other than lawsuits and claims for 1995 through 1999 Accents. If Hyundai did not have to answer RFP No. 20 "as written" because seat back OSI's had subsequently been taken "off the table," then Hyundai's "failure" to produce non-Accent OSI's -- such as those introduced at the evidentiary hearing as Exhibits 10 (Contini), 13 (Reed), 14 (McElliyat), 15 (Gowanny), 16 (Harris), 18 (Liu), 22 (Enriquez), 26 (Chittick), and 29 (Randall), and highlighted by Magana at page 32 of his Brief -- was not a "failure" at all, but properly done pursuant to a valid CR 26 discovery agreement.[5] And the case for a willful discovery violation, based on anything other than Magana's eleventh-hour "claim" theory, collapses.[6]

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[5]Magana asserts his expert witnesses testified that Austin's letter "did not set forth any agreement limiting discovery." See Magana's Brief at 19. Mr. Greenan, Magana's discovery expert, actually testified that Austin's letter should be deemed legally deficient under CR 26, because Austin did not affirmatively recite what Hyundai was not obligated to produce. See VRP (Jan. 17, 2006) 70:17-24. But as Hyundai noted in its Opening Brief, Greenan offered no authority for this dubious conclusion of law; as David Swartling testified, the degree of specificity for a letter confirming a discovery agreement will depend upon the factual circumstances of the individual case. See VRP (Jan. 18, 2006) 32:12-23 (Swartling); Hyundai's Op. Br. at 42, n.28.

[6]Nor can that collapse be averted by the "Elantra" OSI's, as Hyundai will discuss in Section II.G.1, infra, at 19-21.

F. Hyundai Was Denied a Fair Opportunity to Come to Grips With Magana's Eleventh-Hour "Claim" Theory.

1. The Trial Court Denied Hyundai a Fair Opportunity to Be Heard on the Meaning of "Claim," by Refusing to Reconsider Its Findings in the Face of Compelling Evidence Establishing Hyundai's Reading of the Term Was Reasonable. Magana does not deny that the first time he suggested Hyundai violated its discovery obligations, by employing a misleading reading of the term "claim" when first responding to RFP No. 20, was during the hearing held on Friday, January 13, 2006, to determine whether to have an evidentiary hearing the following week.

Imposition of a default judgment as a sanction requires due process. Smith v. Behr Process (supra), 113 Wn. App. at 325. Due process requires a party have a meaningful opportunity to be heard, which must be given at a meaningful time and in a meaningful manner. City of Redmond v. Moore, 151 Wn.2d 664, 670, 91 P.3d 875 (2004) (citing Mathews v. Eldridge, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)). The evidentiary hearing did not give Hyundai a meaningful opportunity to be heard on Magana's eleventh-hour "claim" theory; the decision to hold that hearing was made the same day Magana first raised his "claim" theory, and the hearing itself took place just four days later. Hyundai could not present a meaningful case in support of its interpretation of "claim" until Hyundai filed its motion for reconsideration.[7]

[7]Nothing in CR 59 prohibits submission of new or additional materials on reconsideration. Chen v. State, 86 Wn. App. 183, 192, 937 P.2d 612, rev. denied, 133 Wn.2d 1020 (1997) (citing Sellsted v. Wash. (continued . . .)

Hyundai's reconsideration submission, grounded in the expert testimony of William Boehly and Peter Donnelly, established an eminently reasonable basis for Hyundai's contention that the term "claim," as set forth in RFP No. 20, did not trigger a duty to produce consumer hotline records. See (CP 5582-84) (Boehly Decl. at 2-4, ¶¶ 4-8); (CP 5656-58) (Donnelly Decl. at 2-4, ¶¶ 5-9). Magana offered no evidentiary rebuttal to that evidence. On appeal, Magana asserts Mr. Boehly's testimony, concerning the contrasting federal regulatory definitions of "claim" and "complaint," is irrelevant, because the rule in question was promulgated in 2002. See Magana's Brief at 35. Federal regulations, however, do not spring Athena-like from the forehead of some bureaucratic Zeus; they are the product of years of comment and consideration. The National Highway Traffic Safety Administration rule cited by Mr. Boehly is no exception; the rule's definitions of "claim" and "complaint" reflect a widespread and well established understanding of those terms.[8] In short, and as Mr. Donnelly's

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(. . . continued)
Mut. Sav. Bank, 69 Wn. App. 860, 865 n.19, 851 P.2d 716, rev. denied, 122 Wn.2d 1018 (1993)). In fact, it is appropriate for parties to submit additional evidence in support of reconsideration, when they "did not have sufficient indication prior to the hearing" of an issue, to allow a fair chance "to collect evidence bearing on the question." See In re Matter of Prince, 85 F.3d 314, 324 (7th Cir. 1996) (upholding consideration of new evidence introduced in support of motion to alter or amend judgment under Fed. R. Civ. P. 59(e)). That is precisely the circumstance Hyundai confronted in this case.

[8]See Reporting of Information and Documents About Potential Defects Retention of Records That Could Indicate Defects, Notice of Proposed Rulemaking, 66 Fed. Reg. 66,190, 66,195-96 ("claim"), 66,201-03 ("consumer complaint") (Dec. 21, 2001) (to be codified at 49 C.F.R. pt. 579) (receipt of comments on "claim" and "complaint" from, (continued . . .)

testimony further underscored, Hyundai's response to RFP No. 20 should in no way have misled Magana's counsel.

Willfulness requires acting "without reasonable excuse." Smith v. Behr Process (supra), 113 Wn. App. at 327. To impose a default sanction, it must be determined that Hyundai acted without reasonable excuse, not that it was objectively correct in its interpretation of the term "claim." Hyundai's actions reflected the established meaning of "claim" in crashworthiness litigation -- an understanding underscored by the distinction drawn by Magana himself between "claims" and the other four categories ("complaints," "notices," "lawsuits" and "incidents") set forth in RFP No. 20. Black's Law Dictionary describes the concept of "reasonable" as "[f]air, proper, or moderate under the circumstances." Black's Law Dictionary 1293 (8th ed. 2004). Hyundai's reconsideration submission establishes that Hyundai's interpretation of "claims" was "moderate under the circumstances" of a crashworthiness case.[9] The trial

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(. . . continued)
inter alia, DaimlerChrysler, Ford, and Nissan); Reporting of Information and Documents About Potential Defects Retention of Records That Could Indicate Defects, Final Rule, 67 Fed. Reg. 45,822, 45,835-36 ("claim"), 45,847-51 ("consumer complaint") (July 10, 2002) (to be codified at 49 C.F.R. pt. 579) (receipt of comments on "claim" and "complaint" from, inter alia, Alliance of Automobile Manufacturers, Harley-Davidson, and Volkswagen).

[9]Magana's interjection of yet more definitions for "claim" fails to demonstrate that Hyundai's interpretation was unreasonable. Magana's unsupported assertion, that Washington courts should rely on the ordinary, common meaning of the words in discovery requests found in dictionaries, because "discovery requests are ordinarily propounded to people or entities with no legal training" (Magana's Brief at 35), disregards the circumstances of this complex, highly technical product liability case.

court's refusal to acknowledge the significance of that submission cannot fairly be sustained, and mandates vacation of the finding that Hyundai willfully violated its discovery obligations when it responded to RFP No. 20.

2. The Trial Court's Findings Cannot Be Sustained Even Under Its Definition of "Claim." Even the trial court's preferred definitions of "claim" do not support Magana's "claim" theory. David Swartling, Hyundai's OSI expert, defined "claim" as the "articulation of a problem . . . coupled with a demand for a particular remedy." VRP (Jan. 18, 2006) 48:12-25 (Swartling). The OSI's about which Magana makes so much on appeal do not meet that definition, because they lack a request for a particular remedy. Martinez complained about quality of service. See Ex. 31 (Martinez hotline records). McQuary expressed a concern about "other drivers of Hyundai" cars. See Ex. 32 (McQuary hotline records). Wagner and Pockrus involved similar notices of safety concerns. See Ex. 36 (Wagner); Ex. 38 (Pockrus). All those reports may fairly be characterized as "notices" or even "complaints," but not as "claims," as Mr. Swartling defines the term.[10]

[10]Magana also offered the deposition testimony of Steve Johnson, Hyundai's 30(b)(6) deponent on the issue of the facts of other incidents. But Mr. Johnson made clear his definition of "claim" should not be equated with the definition that applied when others at Hyundai, working with outside counsel, endeavored to answer Magana's RFP No. 20; Johnson also disputed whether Hyundai's consumer affairs contact records should be considered "claims." See Ex. 3 (Johnson Dep., Jan. 10, 2006 at miniscript pp. 52:22-56:9; 58:20-25).

In evaluating the "claim" issue, it bears recalling that Hyundai confronted a very broad request for production in RFP No. 20, and initially attempted to place some limits on that request. Ultimately, the issue was resolved when the parties reached an agreement taking seat back OSI's off the table. Seizing on the fact of two consumer hotline reports involving 1995-1999 Accents that predated Hyundai's initial responses to RFP No. 20,[11] Magana argued those responses were misleading, because Hyundai "knew" it actually had responsive Accent "claims," even as it denied having any. In fact, even using the trial court's preferred definition of claim, Hyundai's response was accurate, because Hyundai did not have any Accent claims when it responded to RFP No. 20. In sum, Magana's "claim" theory cannot sustain the trial court's willfulness finding, either procedurally or substantively.

G. Without the Court's "No Agreement" and "Claim" Determinations, the Trial Court's Finding of a Willful Discovery Violation Cannot Be Salvaged.

1. The "Elantra" OSI's. In support of the trial court's finding that "[t]he Elantra seat was a substantially similar to the Accent," Magana points to alleged "concessions" by Hyundai that purport to establish substantial similarity in the design of the right front seat of the Accent and the Elantra, rendering Hyundai's responses to Interrogatory No. 12 misleading. See Magana's Brief at 38-39. The record is conclusively to

[11]Martinez (Ex 31) was received by Hyundai in February 1998, and McQuarry (Ex. 32) was received that March. Magana has tried to revive Salizar (Ex. 30; received September 1997) as an "arguably Accent" report, but Johnson's testimony wasn't arguable: the VIN number controls, and the Salizar VIN number established Salizar did not involve an Accent.

the contrary. In his October 11, 2005 letter to Peter O'Neil, Hyundai's counsel, Jeff Austin, expressly stated: "I [Austin] told you [O'Neil] that some Elantras . . . had a recliner mechanism that appeared to be similar to the 1995-1999 model year Accent recliner." (CP 4050) (Austin letter at 1) (emphasis added). "Without conceding substantial similarity," Hyundai agreed to produce certain claims and lawsuits related to those Elantras. Id. (emphasis added).

Ignoring the unequivocal refusal to concede substantial similarity, Magana points to a "concession" at an evidentiary hearing, when Austin agreed that the 1992-1995 Elantra "used the same recliner that's on the 1995 to 1999 Hyundai Accent." See Magana's Brief at 39-40 (citing VRP (Nov. 7, 2005) 8:3-5) (emphasis added). But the concession was nothing but a repetition of Austin's prior acknowledgment that the recliner mechanism was the same. The relevant issue is the seat itself, and as Hyundai engineer William Stewart explained, the only similarity between the two seats is the recliner mechanism "and certain bolts and screws": "The common use of some subcomponents does not make the seat assembly equivalent or interchangeable." (CP 3273) (Stewart Decl. at 3, ¶ 9 (emphasis added).

The trial court may have acceded to Magana's glib equation of identity of recliner mechanisms with an admission of substantial similarity of seat design, see (CP 5316-17) (FOF Nos. 13 & 16), but loose reasoning of this sort simply cannot sustain the court's finding of an admission that just was not made. Moreover, on this matter there can be no tenable

finding of willfulness, as Hyundai unquestionably had a reasonable basis for its belief that, while the recliner mechanism was the same, the two models did not share a substantially similar seat design, and Elantras therefore quite properly had not been identified as responsive to Interrogatory No. 12.

2. The PARKS Case. Trying to establish a "pattern" of discovery violations, Magana takes material liberties with the language of the Georgia Court of Appeals' decision in Parks v. Hyundai Motor America, 258 Ga. App. 876, 575 S.E.2d 673 (2002). Magana says that the Parks court "[v]iew[ed] Hyundai's conduct as 'nonresponsive and evasive,'" and "held that Hyundai willfully failed to produce relevant documents specifically requested in plaintiff's discovery." See Magana's Brief at 42-43 (quoting and citing Parks, 575 S.E.2d at 676). In fact, the Parks court actually said: "a question arises as to whether Hyundai America was being nonresponsive or evasive . . ." Parks, at 676 (emphasis added). As to Magana's insistence that the Parks court "held that Hyundai willfully failed to produce relevant documents specifically requested in plaintiff's discovery": The word "willful" does not appear anywhere in the Parks decision, and the actual question on appeal was not whether Hyundai had complied with its discovery obligations but whether summary judgment was proper. See id. at 677; (CP 5760) (Reed Decl. at 2, ¶ 5).

Magana also claims that "[a]fter the Parks court remanded, and after plaintiffs brought a successful motion to compel, Hyundai finally produced 33 responsive OSI's." See Magana's Brief at 43 (citing

CP 4758-59 (Williams Decl.) & CP 5902 (Order Denying Reconsideration)). Magana's reference to a "successful motion to compel" is unsupported by the record Magana cites and refuted by the record Magana ignores. In fact, after the remand, the trial court "never ruled on the Plaintiffs' motion to compel, never made a finding of discovery abuse, and never sanctioned Hyundai." (CP 5760) (Reed Decl. at 2, ¶ 5). Magana cites Clerk's Papers pages 4758 and 4759, the declaration of the plaintiffs' counsel in Parks, as support for his claim of "a successful motion to compel." But that declaration only says that "[s]hortly after the Court of Appeals issued the remand[,] Hyundai Motor America produced thirty-three (33) incidents involving allegations of defects in the Hyundai passenger restraint system." (CP 4759.) There is no mention of a "successful" motion to compel, for the good reason that (as Hyundai's counsel testifies) the court never ruled on the motion. The other portion of the record Magana cites is the trial court's FOF No. 23. The trial court's original FOF No. 23 did refer to a successful motion to compel. See (CP 5319). But the trial court's order denying reconsideration, to which Magana actually cites, amended FOF No. 23, to remove the reference. See (CP 5902). In short, Parks proves nothing about a "pattern" of discovery misconduct by Hyundai, for the very basic reason that Parks was not about discovery misconduct.

3. The ACEVEDO Documents. The late production of documents from Acevedo v. Hyundai also does not justify a default. Acevedo was a single, isolated case out of thousands of cases and records,

and Hyundai's late production of the Acevedo documents does not suggest a pattern of discovery abuse, nor does it prove Hyundai's record-keeping system was the memory of its in-house counsel.[12]

The record shows Magana's legal department staff responded to the trial court's production order by identifying over two dozen lawsuits responsive to the order, and Hyundai promptly produced the records pertaining to those lawsuits. Acevedo was pulled from this production, because Tom Vanderford thought the case was a seat belt, not a seat back case -- a recollection shared by the Acevedo plaintiff's counsel, who listed the case as a "seat belt" matter on their website. (CP 3304, 3415) (Vanderford Decl. at 7, ¶ 5, and attaching reproduction of website posting, Ex. J). In sum, the notion that Acevedo raises a true concern about whether Hyundai has yet to produce all responsive documents is nothing but a chimera of the trial court's creation, and not a legitimate indictment of Hyundai's discovery conduct.[13]

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[12]As for Magana's asking Tom Vanderford whether the Acevedo documents had been produced while Mr. Vanderford was on the stand during the evidentiary hearing, Magana ignores that his counsel had numerous opportunities to discuss the issue personally with Mr. Vanderford or Hyundai's local trial counsel, well before Vanderford's testimony. The decision to wait until Vanderford was on the witness stand was an unnecessary and misleading theatric; the trial court should not have based FOF Nos. 28 and 29 on that (supposed) "gotcha" moment.

[13]As Hyundai noted in its Opening Brief, the concept of unreliable record-keeping was not even raised by Magana, but by the trial court itself, in its oral ruling after the close of evidence at the evidentiary hearing. Opening Brief at 68 n.43. The trial court then ignored Hyundai's evidence on reconsideration, establishing its full compliance with the federal government's rigorous record-keeping requirements for consumer complaints and claims. Id. (citing record).

H. Magana's Defense of the Trial Court's Finding of Prejudice Only Confirms That Magana Did Not Begin to Establish That a Fair Trial on His Claims Was No Longer Possible, and That Magana Therefore Failed to Establish the Degree of Prejudice Necessary to Support a Default Judgment.

1. Magana Fails to Rebut the Relevant Facts: That Based on the Record at the Time of Default, There Was No Way to Assess Prejudice Without Further Investigation, and Continuing the Trial Date and Giving Magana Time to Seriously Investigate the OSI's Was the Only Way to Determine What -- if Any -- Prejudice Magana Might Have Suffered. In a crucial concession, Magana agrees with Hyundai that "a default judgment is only appropriate when a discovery violation deprives a plaintiff of a fair trial." Magana's Brief at 44 (quoting Opening Brief at 70) (internal quotation marks omitted). Magana also agrees that "a trial is a search for the truth[.]" Id. at 44-45 (quoting Opening Brief at 71-72). Magana asserts that "when one party hides the truth, a fair trial is impossible." Id. at 45. But "hidden" things often can be uncovered. And since (as Magana concedes) a default judgment is only appropriate when a discovery violation makes a fair trial impossible, a default judgment cannot be justified, unless it has first been shown by a diligent effort that: (1) the suspected hidden truth in fact cannot be uncovered; (2) the discovery violation itself is the reason the suspected truth must remain out of reach; and (3) the inability to access that truth has made a fair trial impossible.

This is the fundamental problem with Magana's argument about prejudice and alternative sanctions. Magana laments lost "opportunities" and trumpets late-produced OSI discovery (see Magana's Brief at 44),

when in fact that discovery may never have been admissible at trial. Magana asserts that "[i]n the real world, more delay is not necessary to establish the inevitable." Magana's Brief at 47. But in the real world nothing was "inevitable" about the ultimate value of the OSI discovery to Magana's ability actually to prove his claim of defective design. Here this Court confronts precisely the phenomenon about which the Texas Supreme Court warned in the Nissan case (quoted at the outset of this Brief): the assumption that a seemingly large number of complaints likely means the plaintiff's defective design claim is true. See Nissan Motor Co. v. Armstrong, 145 S.W. 3d at 142. As the court in Nissan recognized, "several" restrictions must be overcome before raw complaints may be admitted into evidence as substantive proof supporting a plaintiff's claim, and trial courts "must carefully consider the bounds of similarity, prejudice, and confusion before admitting evidence of other accidents involving a product." See 145 S.W.3d at 139-40.

Moreover, in this case, the risk of confusion -- to use Magana's preferred imagery, the risk of the jury mistaking the glitter of fool's gold for the real thing -- is especially great, precisely because Hyundai and Magana actually agree on the one fact to which the supposed OSI's might otherwise speak: that in rear-end accidents, Hyundai front seats would yield when subjected to a certain level of force. Magana therefore confronted a particularly heavy burden to establish the admissibility of any of the OSI discovery material produced by Hyundai. And to prove prejudice arising out of any discovery violation pertaining to this material

-- to prove that any violation made a fair trial impossible on Magana's claim of a defectively designed seat back -- Magana had to prove that his ability to establish admissibility had somehow been fatally compromised by that discovery violation.

To do that, Magana claimed Hyundai had wrongfully delayed the production of the OSI materials, and that this delay had prejudiced the ability to establish substantial similarity, focusing on substantial similarity of accident. But first Magana needed to establish substantial similarity of design. The facts of design plainly would not be affected by delay, and as Hyundai discussed in its Opening Brief, Magana's only evidence addressed to the overwhelming majority of the OSI's did not establish admissibility, only discoverability. See Hyundai's Opening Brief at 32 & 80, n.49 (discussing nature of testimony from Magana's design expert, Mr. Syson); (CP 327) (Stewart Decl., ¶ 9); (CP 5578-79) (Blaisdell Decl., ¶ 20). Magana's failure to show similarity of design sufficient to establish admissibility at trial for the great majority of the OSI's at issue independently discredits the notion that Magana suffered prejudice sufficient to justify a default.

As for substantial similarity of accident: Magana made no real effort to determine whether any of the OSI would actually have been admissible at trial. As explained in Hyundai's opening brief, the only specific evidence Magana submitted to establish the "staleness" of the OSI reports was testimony offered for the first time at the evidentiary hearing, about phone calls Magana himself made to some of the telephone numbers

listed on the reports themselves. See Opening Brief at 76. Hyundai responded by demonstrating that law firms have numerous resources for tracking down individuals, none of which Magana used. See id. at 76-77 (citing CP 5761-61, 5495-96). Magana has made no effort to refute Hyundai's evidence that his counsel used only a fraction of the available resources to track down individuals listed on the OSI reports.[14] Instead, Magana claims that "[t]he trial court also . . . saw and heard testimony that witnesses have died or moved away, and evidence has been lost or destroyed." See Magana's Brief at 46.

The evidence Magana cites as support for this evocative rhetoric is his own testimony about his phone calls to people named on the OSI reports, a chart indicating which witnesses he was able to reach, and Ms. Nikki Holcomb's testimony about her accident and a misplaced seat back. The only evidence indicating that a potential witness died is one notation on the chart for one witness to one OSI. See Ex. 1 at unnumbered page 3 (referencing the passing away of a witness to the Schiller accident); see also Ex. 21 (Schiller). Magana offered no evidence to show the witness was the only source through which to reconstruct the facts of that particular accident. As for witnesses who "moved away," Hyundai has already demonstrated that Magana's counsel did not use anything close to

[14]Magana does assert that Hyundai failed to "challenge the trial court's finding that much of the OSI evidence is now 'irretrievable.'" Magana's Brief at 47 (quoting FOF No. 68). In fact, Hyundai directly challenged that finding, assigning error to it and arguing its deficiencies. See Opening Brief at 1 (Assignment of Error No. 2) & Ex. A at Corresponding Clerk's Papers p. 5333 (assigning error to FOF No. 68); id. at 75-76 (arguing that assignment of error).

the full resources available to them to locate witnesses. As to "lost or destroyed" evidence, that claim presumably refers to the seat from Nikki Holcomb's car. But Holcomb's testimony about the accident itself (under cross-examination by Hyundai's counsel) disclosed facts establishing the accident was not substantially similar to Magana's, making the missing seat irrelevant. See (CP 5576-77) (Blaisdell Recon. Decl. at 5-6, ¶¶ 12-16).

Plainly, it would only have been possible to know the extent to which evidence had become stale if Magana conducted a serious investigation of the OSI's, and Magana did not do so here. Magana states his counsel could not have completed the process in time for the January 2006 trial date, see Magana's Brief at 46, but that observation misses the point. Magana would have had time to conduct the process with a continuance.[15] But he refused a continuance, essentially arguing that the trial needed to take place immediately or never, and then urging that Hyundai be defaulted, because an immediate trial would not be fair, because the OSI's could not be used. That was an utterly artificial

[15]Magana states that "every witness agreed that it would be extremely difficult or impossible to develop the OSI evidence at this late date." See Magana's Brief at 48, citing CP 2646-50, 2667-702, 2663-66, 3262-70; VRP 1/17/06 98-101, 101, 110, 136-41; VRP 1/18/06 16-17. But review of the evidence cited shows the "extremely difficult" or "impossible" task referred to by the witnesses was only the challenge of developing the OSI in time for the January 2006 trial date, while other evidence established that a few months would have been ample to conduct a thorough review of the OSI's at issue. See VRP (Jan. 18, 2006) 20:7-21:24 (direct); 83:5-84:21 (redirect) (describing the four months required to review the OSI production in Jaramillo, in which Magana's counsel represented the plaintiff).

"unfairness," wholly the product of Magana's rejection of the one choice -- a continuance -- that offered the continued possibility of a fair trial.[16] Nor would a continuance have been a "reward" for Hyundai. See Magana's Brief at 45. A continuance was the only way to determine if a fair trial was no longer possible. By rejecting taking the time to answer the unanswered questions, and thereby accurately assess prejudice, the trial court (at Magana's behest) chose speed and expedience over accuracy and justice.

2. A Default Judgment Should Not Be Permitted as a Sanction for a Discovery Violation Unless the Party Requesting the Default Can Establish That a Fair Trial Is No Longer Possible -- Even if a Default Would Bring the Controversy to a Speedier Conclusion. Magana does his level best to defend his desultory efforts before the trial court to prove prejudice. But the true, heartfelt core of his prejudice argument plainly is the contention that "enough is enough" -- that, because it has now been 10 years since the accident, any more delay for any reason is unacceptable, and for that reason alone the trial court was right to default Hyundai. As Magana puts it, "Hyundai simply ignores the value of finality," Magana's Brief at 47 and the trial court properly decided to "bring[] this case to an

[16]Of course, a trial was anything but a sure thing for Magana. Even with the benefit of the Burton evidence, Magana won the first trial by only the barest of margins. And on retrial Magana confronted a battery of new issues and evidence, including new crash tests directly challenging key premises of his theory of the case at the first trial. (Magana had moved to exclude those crash tests, and that motion was pending at the time the trial court defaulted Hyundai. See (CP 2712-35) (Magana's Motion); (CP 4552-72) (Hyundai's Opposition).)

end." Id. at 48. That argument improperly and dangerously elevates speed above accuracy.

Magana correctly notes that "Article I, § 10 of the Washington State Constitution requires that '[j]ustice in all cases shall be administered . . . without unnecessary delay.'" See Magana's Brief at 47. But Magana then editorializes, repeating the phrase "all cases." Id. Magana should have instead focused on the phrase "without unnecessary delay." For while courts are thereby commanded to achieve justice expeditiously, the language of the Constitution plainly recognizes that sometimes delay is necessary to achieve the higher value of determining the truth of a dispute, and meting out justice in accordance with that truth.

That such is the actual value judgment of the Constitution is confirmed when one compares the language of Article I, Section 10 to its criminal law counterpart. Criminal defendants have the right "to have a speedy public trial . . . ." Wash. Const. art. I, § 22. The vital distinction between the two sections is that Section 22 is not qualified by the word "unnecessary" -- criminal defendants have an absolute right to a speedy trial, even if someone other than the accused could reasonably consider there to be a good reason for a delay. This rule reflects an understanding that protecting the rights of the accused is often more important than reaching the factually correct result in a criminal case. Civil cases are different: Section 10 certainly expresses a preference for minimizing delays, but the word "unnecessary" demonstrates that accuracy trumps speed, when achieving justice in civil disputes.

In sum, there is no support in Washington law or in general principles of justice and fairness, for Magana's contention that speed eventually trumps accuracy -- that just because a case has pended for some period of years, it suddenly becomes preferable to bring the case to an end, even if a fair trial, in which the truth of the controversy would be resolved, may still be had.[17] This Court should make clear that the sanction of default should never issue for discovery violations when a fair trial is still possible, even if that means a case will take another six months (or even more) to resolve. Accuracy and justice are more important than speed and expedience.

3. Magana's Attempt to Blame Hyundai for the "Delay" in Resolving This Case Is Unfair and Disingenuous. Magana insists that requiring him to investigate the OSI's and accurately determine what, if any, prejudice exists "places absolutely no value on timely justice . . . ." Magana's Brief at 48. That is false. Of course there is value in resolving cases quickly. But (and as Hyundai has shown) there is more value in

[17]This conclusion is underscored by the only case that Magana cites to support his "speed rules" view of the law. Magana cites Johnson v. The Cash Store, 116 Wn. App. 833, 68 P.3d 1099 (Div. III), rev. denied, 150 Wn.2d 1020 (2003), for the proposition that "[j]ustice is not done . . . if continuing delays are permitted." Magana's Brief at 47 (quoting Johnson, 116 Wn. App. at 841). The quotation is technically accurate, but substantively misleading. Johnson is a classic default case, where the trial court entered a default because the defendant never answered the complaint or filed a notice of appearance, and could offer no good excuse for failing to do either. See 116 Wn. App. at 837 & 848. In telling contrast, the present case has been actively litigated, and the initial judgment on jury verdict had to be reversed because of prejudicial error induced by the respondent.

resolving them correctly, and it is absurd to suggest that insisting on accuracy "places absolutely no value on timely justice."

Moreover, Magana's attempt to lay the responsibility at Hyundai's feet for the fact 10 years have passed since the accident, and without resolution of responsibility for Magana's injuries, misrepresents the reasons for that passage of time. During the first three years, Magana had yet to file his lawsuit, waiting until the eve of the statute of limitations to sue. It then took two and a half additional years from the filing of the complaint to get to the first jury trial. Another two years elapsed between Hyundai's notice of appeal and this Court's decision reversing the verdict in the first trial. Magana then moved for reconsideration, and the issues raised by that motion required six months more to resolve. This Court issued its order denying reconsideration on February 24, 2005, some eight years after the accident. The next year, the trial court issued its default order. Had the trial court instead ordered a continuance to determine whether Magana had in fact been prejudiced, that process would have been completed by the Summer of 2006, and a trial held and verdict rendered that Fall. Even if one credits speed and finality to the degree Magana demands, the record of this case, with the specific causes for its particular passage of years, does not justify short-circuiting the search for truth, which affirming the trial court's default will do.

4. Any Staleness in OSI Evidence Established by an Investigation Can Be Addressed by a Remedy Short of Default. Although Magana won't admit it, it is quite literally certain that an investigation

would establish a fair trial could still be had. The most an investigation might show is that the admissibility of some OSI's can no longer be determined because of gaps in the historical record attributable to delay in production. As Hyundai explained in its Opening Brief, the solution to this problem is to admit the affected OSI's, and bar Hyundai from challenging substantial similarity based on the historical gaps. Hyundai would remain free to challenge substantial similarity based on grounds unaffected by such gaps, as well as to argue relevance. Hyundai's design expert would remain free to offer his opinion that the fact of these OSI's does not render Hyundai's seat back design unreasonably dangerous, just as Magana's design expert would be free to point to the OSI's as (supposedly) buttressing his contrary view. The ultimate issue -- was the seat back unreasonably dangerous? -- would remain for the jury to decide. The truth of the case, therefore, would be resolved through trial by jury, as it should be -- instead of canceling that jury determination of the truth, and imposing the "finality" of a default judgment, as the trial court, at Magana's urging, chose to do instead.[18]

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[18]Magana claims Judge Foscue's analysis in Behr establishes that default is the only appropriate sanction here. See Magana's Brief at 50-51. In Behr, after the plaintiffs filed their lawsuit, Behr commissioned experts to test for various chemical anomalies or other deficiencies in the wood stain at the heart of the plaintiffs' case. The tests demonstrated that there were indeed problems with the wood stain, but Behr purposefully withheld these tests from the plaintiffs, and the testing evidence was subsequently "lost." In short, Behr commissioned a test in the course of the litigation that could, itself, prove or disprove the plaintiffs' claims, got unfavorable results that were conclusive of liability, and hid the bad news to the point of unrecoverability. See (CP 2586-87, 2590-91 & 2593-94) (Judge Foscue's Oral Ruling). This is patently differently from the fact pattern (continued . . .)

5. "Failure to Warn" Cannot Salvage the Trial Court's Prejudice Determinations. Magana claims he would have brought a failure to warn claim if the OSI's had been available earlier, and the trial court treated that as part of its prejudice determination. See Magana's Brief at 46. But conclusory allegations about a failure to warn claim simply cannot qualify as prejudice, without at least some additional information as to what the claim would involve.

Under Washington law, a failure to warn claim cannot survive if "the manufacturer's failure to give adequate warnings was not a proximate cause of the [plaintiffs'] injuries." Soproni v. Polygon Apartment Partners, 137 Wn.2d 319, 326, 971 P.2d 500 (1999). This is because, "when a person is aware of a risk and chooses to disregard it, the manufacturer's warning serves no purpose in preventing the harm." Anderson v. Welso, Inc., 79 Wn. App 829, 839, 906 P.3d 336 (1995) (internal quotation omitted). Accordingly, a plaintiff must give some indication of what warning the product at issue should have had and how that warning would have prevented the plaintiff's injury.

Here, Magana has not said what warning the vehicle should have had, nor has he suggested how that warning would have helped him avoid injury. Typically, warnings instruct users to avoid certain behaviors, like turning a passenger air bag off when young children are in the front seat.

(. . . continued)
here. The information Magana seeks is of uncertain relevance and of collateral import at best, and the discovery materials were maintained in the ordinary course and produced when ordered by the Court.

In this case, if Magana's claims about the Accent's seat are treated as true, the only possible warning could have been "do not ride in this seat." A warning instructing a user never to use a product is no warning; it is a statement that a product is defectively designed, and such a claim would be no different than the product defect claim Magana already brought.[19]

6. All Other Issues Aside, Magana Cannot Justify Default on the Issue of Who Was Sitting Where. There are two distinct and equally important issues in this case: (1) whether the Accent's front passenger seat was safe as designed, and (2) whether Magana was sitting in the front or the back. Magana argues that the seat was unsafe and he was sitting in the front; Hyundai argues that the seat was safe and Magana was sitting in the back. Magana needs to convince a jury on both points to prevail.

The clear thrust of Magana's sanctions motion, from the original motion through the evidentiary hearing and motion for reconsideration, was that the late-produced discovery prejudiced Magana's ability to prove that the front passenger seat was defective. The seating location issue was not discussed in Magana's sanctions motion or at the evidentiary hearing. Dr. Burton, Magana's biomechanics expert, issued no declaration explaining why the late-produced discovery prejudiced Magana's ability to have trial on the seating position issue. See (CP 2667-70). Magana

[19]Magana states that "[b]oth parties' experts testified that OSI's are relevant to a failure-to-warn claim." Magana's Brief at 22 (citing VRP (Jan. 18, 2006) at 18 (Swartling); VRP (Jan. 17, 2006) at 115 (Baron)). David Swartling, Hyundai's expert, said that, under certain circumstances, OSI's can be relevant to a failure to warn claim, but he did not say that would be so here. See VRP (Jan. 18, 2006) at 18. (Nor, for that matter, did Magana's expert, Mr. Baron.)

now cites some of the OSI's and speculates they might show something about seating positions. See Magana's Brief at 53. This is simply untenable evidence -- Magana has not presented any evidence even suggesting that the OSI's are relevant to seating position, an issue that turned primarily on medical records and conflicting witness testimony at the first trial. Whatever sanction might be justified as to the seat defect issue, this Court should not affirm a sanction on the seating position issue, and Hyundai should be entitled to retrial on at least that issue.

I. Remand to a Different Judge Is Necessary to Preserve the Appearance of Fairness.

Magana concedes that the "mere suspicion" standard set forth in Chicago, Milwaukee, St. Paul & Pac. R.R. Co. v. Wash. State Human Rights Comm'n, 87 Wn.2d 802, 557 P.2d 307 (1977), is the standard that Washington courts apply when considering whether to remand to a new judge, in order to avoid an appearance of bias. See Magana's Brief at 55-56 (first discussing the recusal standard but then agreeing that this Court in In re Custody of R., 88 Wn. App. 746, 763, 947 P.2d 745 (Div. II) 1998) "applie[d] the correct standard" -- i.e., the "mere suspicion" standard -- to resolve the remand issue before it). As our Supreme Court recently stated in In re Disciplinary Proceeding Against Sanders, ____ Wn.2d ____, 145 P.3d 1208 (2006):

> Where a judge's decisions are tainted by even a mere suspicion of partiality, the effect on the public's confidence can be debilitating. The canons of judicial conduct should be viewed in broad fashion, and judges should err on the side of caution.

Id. at 1212 (emphasis added).

Hyundai provided a detailed analysis in its Opening Brief of several instances that Hyundai believes give rise to concern about bias. See Hyundai's Opening Brief at 85-97. Hyundai believes that the "Judge of the Year" Award episode, especially in light of the Supreme Court's recent decision in the Sanders case, should be dispositive of the remand issue.[20] Magana's attempt to paint a benign picture of Judge Johnson accepting "an award for outstanding service on the bench," see Magana's Brief at 59, ignores the following facts:

- Magana's counsel nominated Judge Johnson for the Washington State Trial Lawyers' "Judge of the Year" Award after Judge Johnson granted the default against Hyundai, and she received the award for that ruling. See Johnson Judge of the Year: State Trial Lawyers Honor Her for Role in Hyundai Case, The Columbian, July 20, 2006, 2006 WLNR 12504631.

- Magana's counsel nominated Judge Johnson and the judge accepted the award, knowing the case could be remanded after yet a second reversal.

As our Supreme Court recently stated, "[t]he canons of judicial conduct should be viewed in broad fashion, and judges should err on the side of caution." See In re Sanders, 145 P.3d at 1212. Judge Johnson's acceptance of WSTLA's "Judge of the Year" award was the antithesis of the caution that the canons and our Supreme Court demand. Especially with more than 40 unresolved evidentiary issues awaiting decision, see Hyundai's Opening Brief, Ex. D (chart listing pending motions), remand to a different judge is the safest course.

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[20]Hyundai will stand on its Opening Brief discussion of the other instances.

J. Prejudgment Interest and the Smiths.

1. Prejudgment Interest. Magana responds to Hyundai's equitable argument to deny prejudgment interest with two assertions of Hyundai's supposed "unclean hands." First, Magana attempts a reprise of his failed motion for reconsideration before this Court, again alleging Hyundai "lied to the trial court and to this Court" about its knowledge of the scope of Burton's testimony. See Magana's Brief at 60-61. As Hyundai has previously discussed, that allegation is meritless. See § II.C., supra, at 4-5. Second, Magana points to the present discovery controversy, ignoring that Magana seeks to have this Court infer an impact on the first trial which the trial court rejected as speculative. See Magana's Brief at 62; VRP (Jan. 13, 2006) 73:8-11. Prejudgment interest should have been denied to Magana because his counsel induced clear error at the first trial, and that error necessitated reversal and remand for retrial.

2. The Smiths. When the claimant is determined to be "fault-free," as here, the defendants against whom judgment is entered are jointly and severally liable. RCW 4.22.070(1)(b). While the trier of fault "shall determine the percentage of the total fault which is attributable to every entity," RCW 4.22.070, that determination is irrelevant to the ultimate consideration of payment, if Hyundai dismisses any cross-claim against the Smiths for contribution. This Court should direct dismissal of the Smiths as active participants, upon Hyundai's dismissal of its cross-claim against them for contribution.

III.

CONCLUSION

This Court should reverse the default judgment and related fee and cost awards, and remand to a new judge for further proceedings. No sanction should be imposed unless a willful discovery violation relating to the production of OSI's has been established. And in no event may a default judgment sanction be imposed.

RESPECTFULLY SUBMITTED this 15th day of February, 2007.

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APPENDIX TO REPLY BRIEF

HYUNDAI'S COMPLIANCE WITH ALL REQUIREMENTS TO CHALLENGE A FINDING OF FACT

Finding of Fact Magana Asserts Not "Argued" by Hyundai	Page In Magana's Brief Where Assertion Made	Did Hyundai Assign Error?	Page in Hyundai's Opening Brief Where Error Assigned	Argument Section of Hyundai's Opening Brief ("Cross-reference" on the page(s) indicated in parentheses)
FOF 6	Page 6	YES	Page 1	Pages 56-70, 75-81 (64)
FOF 26	Page 17 n. 11	YES	Page 1	Pages 60-64, 67-68 (60)
FOF 52	Page 6	YES	Page 1	Pages 56-70
FOF 65	Page 51	YES	Page 1	Pages 56-60, 80-81 (80)
FOF 66	Page 51	YES	Page 1	Pages 83-84
FOF 68	Pages 47, 51, 52	YES	Page 1	Pages 70-84 (74, 76)
FOF 69	Page 51	YES	Page 1	Pages 70-84 (74)
FOF 70	Page 51	YES	Page 1	Pages 70-84 (83)
FOF 74	Page 64	YES	Page 1	Page 77 (77 n. 47)

NOTE: Hyundai did not assign error to Finding of Fact 67, because it did not find the finding relevant to the issues in this appeal. Magana, while claiming that Hyundai did not "argue" this finding (Magana's Brief at 51), does not explain why he thinks this finding is dispositive of the appeal.

No. 29347-1-II

DIVISION II, COURT OF APPEALS
OF THE STATE OF WASHINGTON

JESSE MAGANA,

Plaintiff/Respondent

v.

HYUNDAI MOTOR AMERICA; HYUNDAI MOTOR COMPANY; and RICKY and ANGELA SMITH, husband and wife,

Defendants/Appellants

and

DENNIS NYLANDER and JANE DOE NYLANDER,

Defendants

ON APPEAL FROM CLARK COUNTY SUPERIOR COURT
(Hon. Barbara D. Johnson)

DECLARATION OF SERVICE

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I, Kathryn Savaria, declare under penalty of perjury as follows:

1. I am now and at all times herein mentioned, a citizen of the United States and resident of the State of Washington, over the age of eighteen years, not a party to the above-captioned action, and competent to testify as a witness.

2. I am employed with the law firm of Lane Powell PC, 1420 Fifth Avenue, Suite 4100, Seattle, Washington.

3. On February 15, 2007, I caused to be served true copies of the following documents:

Appellant's Reply Brief;
Motion for Overlength Reply Brief ;
Appellants' Renewed Motion to Transfer Verbatim Reports of Proceedings; and
Declaration of Service

on the following parties in the manner as indicated below:

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The foregoing statements are made under penalty of perjury under the laws of the State of Washington and are true and correct.

Signed at Seattle, Washington, this 15th day of February, 2007.

Kathryn Savaria

Kathryn Savaria